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No. 85-1672

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM D. MERCHANT

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether due process requires personal notice to a defendant, rather than notice to his attorney, of a scheduled court hearing.

2. Whether the Fourth Amendment exclusionary rule requires the suppression of evidence obtained by law enforcement officers acting in reliance on a facially valid judgment of probation, where the judgment is subsequently held invalid on the ground that it was entered at a proceeding that was procedurally defective.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Cleo L. Marohn was named in the indictment, but she was dismissed from the case by the district court and did not appear in the court of appeals.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 760 F.2d 963. The order of the district court (Pet. App. 15a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a) was entered on May 14, 1985, and a petition for rehearing was denied on January 13, 1986 (Pet. App. 19a). On March 6, 1986, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 12, 1986. The petition was filed on April 11, 1986, and was granted on June 30, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fourteenth Amendment provides, in pertinent part:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Northern District of California, respondent was convicted of manufacturing phencyclidine (PCP), in violation of 21 U.S.C. 841(a)(1). Respondent was sentenced to ten years' imprisonment, was fined $25,000, and was given a special parole term of seven years (J.A. 208). The court of appeals reversed (Pet. App. 1a-14a).

1. In 1980, respondent was convicted in California state court on two misdemeanor counts of brandishing a firearm. Pet. App. 2a, 16a. The state court placed respondent on three years' probation. On one count, the court sentenced respondent to one year's imprisonment, with the entire term suspended in favor of probation; on the other count, the court ordered respondent to serve six months in jail (J.A. 40). As additional conditions of probation, the state court forbade respondent from possessing firearms during his probationary term and required him to "submit his

person, residence or vehicle to search and seizure at any time of day or night by a peace officer with or without a warrant" (J.A. 40; *id.* at 33, 34).

Immediately after the court had pronounced sentence, a colloquy ensued among the court, respondent, and respondent's trial counsel. Respondent protested that the six-month period of incarceration would be financially burdensome because, as he put it, "what this means to me is everything I own. * * * I have $1,500 a month tractor payments which I cannot make in jail" (J.A. 40). In response to that plea, the state court agreed to "give you a stay of execution to allow you to enter any work furlough program. I don't want anyone to lose their job" (*ibid.*). Respondent's attorney then stated that he would appeal the conviction on the second count, on which respondent had been ordered incarcerated, and he asked if he could file a notice of appeal at that time (*ibid.*; see also *id.* at 109). The court replied that the sentence would be stayed pending the appeal (*id.* at 40). At the conclusion of the sentencing proceeding, respondent signed a form acknowledging that he had read and understood the search and firearms conditions of probation (*id.* at 33, 185-186).[1]

2. Two months later, in January 1981, the state prosecutor received several reports from respondent's neighbors that they had heard the sound of gunfire coming from respondent's property; one neighbor also reported that respondent had said that he had a .45

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[1] A copy of the state court judgment, executed by the clerk and filed on November 14, 1980, contains a handwritten notation at the bottom that reads (J.A. 34): "Confinement date to be cont. pending appeal." The district court in this case took judicial notice of that document (*id.* at 185).

caliber handgun (J.A. 145-146, 148-149, 163-165).[2] Believing that respondent may have violated his probation by possessing firearms, the prosecutor examined the file on respondent's case and researched the effect of the stay of respondent's sentence on the conditions of his probation (*id.* at 54-56, 165-166, 170-171). Although she concluded that only the six-month period of detention had been stayed, and not the three-year probationary period or its conditions (*id.* at 165, 172, 174), the prosecutor did not immediately order a search of respondent's residence. Rather, on February 11 she filed and served on respondent's counsel a motion (*id.* at 44-48) seeking clarification of the court's stay order, so as to eliminate any potential confusion about whether the conditions of respondent's probation were in effect (*id.* at 56-57, 65, 174). After that motion was filed, respondent's counsel had several telephone conversations with his client, but he did not advise respondent about the hearing (*id.* at 98-99, 105-107, 112-113).[3]

3. The prosecutor's motion came on for a hearing on February 27 (Pet. App. 22a). Shortly before the hearing began, the prosecutor told respondent's counsel about the reports of gunfire from respondent's

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[2] The prosecutor also received a complaint that marijuana plants were growing on the border between respondent's property and a neighbor's, but the complaint turned out to be unfounded (J.A. 61-63, 82, 147, 154-155, 163, 169, 177-179, 191-192).

[3] Respondent's counsel apparently believed that his client's presence was unnecessary because the hearing would not affect his bail status or his appeal on the count on which he had received the jail term (J.A. 103-106).

property (J.A. 166).[4] At the outset of the proceeding, the state court noted that respondent's counsel was present, but respondent was not (Pet. App. 22a). Respondent's counsel did not object to conducting the proceeding in respondent's absence, and on the merits he consented to the prosecutor's motion, agreeing that it was "well taken" (*ibid.*). The court then stated that "[the] Court will grant the motion for clarification. Defendant will be reinstated on the terms of probation" (*ibid.*). The court made clear that "[t]he entire probation order that he signed," including the provision forbidding respondent from possessing firearms, was in effect, although respondent was not yet required to report for confinement (*ibid.*). Respondent's counsel subsequently wrote respondent a letter to inform him about the proceeding and the fact that the conditions of his probation were in effect (J.A. 99, 100-102, 108, 109, 110).[5] Respondent, however, did not receive the letter until a number of days after the February 27 hearing (*id.* at 99-101).

4. Four days after the hearing, on March 3, several police officers, the state prosecutor, and a civil

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[4] The state prosecutor testified at the suppression hearing that respondent's attorney

> came in and made a somewhat directorial comment about the motion. I said something to the effect of, "Sam, what do you expect me to do? We're still having the same problems." I told him to tell [respondent] to cool it. The neighbors are calling lately and he's still firing the guns up there.

J.A. 166; see also *id.* at 85-86.

[5] The letter stated, in part, that " '[b]asically the District Attorney wanted to maintain the probationary order as active on the first count. * * * The court ordered that the probation remain effective pending the appeal' " (J.A. 111).

process server went to respondent's house to conduct a search for firearms and to execute a civil judgment against respondent (J.A. 114-115). After the officers stated their purpose, respondent became excited and asked to speak with his lawyer (*id.* at 115-116). Accompanied by a police officer, respondent was allowed to call his attorney, who told the prosecutor that respondent had not been notified of the state court's February 27 order (*id.* at 71-73, 101-102, 110-111, 116-117, 180). The prosecutor decided that the search should be conducted nonetheless. While at respondent's residence, the prosecutor also spoke briefly with the state trial judge (*id.* at 73-75, 180). The judge said that he had received "a very hysterical phone call from [respondent's attorney]" (*id.* at 74), and that he contacted the prosecutor to learn the reason for the attorney's concern. After being informed by the prosecutor that respondent's residence was being searched, the state judge replied that he had called the prosecutor simply because respondent's counsel was upset. He added that his call should not be treated as either approval or disapproval of the search (*id.* at 74-75).

During the ensuing search, the officers discovered approximately 80 firearms (J.A. 129). In addition, the officers inadvertently discovered approximately three pounds of methaqualone tablets (quaaludes), a large quantity of chemicals and laboratory equipment that could be used to manufacture PCP, and approximately $360,000 in cash (Pet. App. 3a, 16a-17a; J.A. 118-121, 129-131). At that point, the officers arrested respondent and halted their search in order to obtain a telephonic search warrant for respondent's residence (*id.* at 121-122, 127). After obtaining the warrant,

the officers discovered additional narcotics and laboratory equipment (Pet. App. 3a, 17a).

5. Based on the evidence seized during the search of respondent's house, a federal grand jury indicted respondent on three narcotics charges (J.A. 30-31). Before trial, respondent moved to suppress the evidence seized from his residence. He argued, inter alia, that the search could not be justified under the consent-to-search provision of his probation order, since he had not been notified of the state court's February 27 hearing or order.

The district court denied the motion for two independent reasons (Pet. App. 15a-18a). First, the court held that the search was lawful because respondent was on probation at the time the search was conducted (*id.* at 17a). The court found that the state court had stayed only that portion of respondent's sentence ordering his incarceration and had not stayed the imposition of probation (*ibid.*). Second, the court held that, in any event, the evidence seized during the search of respondent's house should not be suppressed (*id.* at 18a). The court found that "the law enforcement personnel involved and, for that matter, [respondent's] attorney * * * all held a good faith belief that they had the authority to make a warrantless search of [respondent's] residence based on the [state] trial court's ruling on the motion for clarification or modification' (*ibid.*). Concluding that the exclusionary rule should not apply where evidence " 'is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken[,] belief that they are authorized,' " the court denied respondent's suppression motion (*ibid.*, quoting *United States* v. *Williams*, 622

F.2d 830, 840 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981).[6]

6. The court of appeals reversed the district court and ordered the evidence suppressed (Pet. App. 1a-14a). At the outset, the court held that respondent had not been placed on probation when he was sentenced on November 14, because the state court had stayed respondent's entire sentence and not merely the portion requiring his incarceration (*id.* at 5a-6a). The court of appeals then ruled that the state court's February 27, 1981, order was invalid because respondent was not given personal notice of the proceeding (*id.* at 6a-10a). Characterizing the February 27 proceeding as "neither a revocation nor an extension of probation, but * * * what amounted to an initial imposition of probation" (*id.* at 8a), the court held that the consent-to-search provision of the probation order constituted a burden on respondent's liberty, requiring that he be given personal notice of the proceeding (*id.* at 8a-9a). "Notice to and the presence of [respondent's] attorney does not suffice" for due process purposes, the court held (*id.* at 10a (footnote omitted)). Because respondent had not been personally notified of the February 27 hearing, the court held that the order the state court entered on

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[6] The municipal court judge who had originally sentenced respondent later revoked his probation because of the discovery of firearms in his residence. The Superior Court Appellate Division reversed that order, on the ground that respondent was unaware that the conditions of his probation were in effect. *People* v. *Merchant*, No. 296 (Cal. Super. Ct. Nov. 17, 1981), slip op. 2 (J.A. 194-196). In so ruling, however, the court expressly stated that "[w]e do not in any respect disagree with the decision of the [district court in this case], which held that * * * the probation search was lawful." Slip op. 3 (J.A. 195).

that day was "a nullity" (*ibid.*). Accordingly, the court concluded, the search on March 3 could not be upheld on the strength of the consent-to-search clause in the state court's probation order (*ibid.*).

The court of appeals then turned to the question whether the evidence seized from respondent's house was nevertheless admissible under *United States* v. *Leon*, 468 U.S. 897 (1984). Pet. App. 10a-14a. The court held that the evidence was not admissible because, in the court's view, "none of the law enforcement officers reasonably could have believed that the search related to the interests of effective probation supervision" (*id.* at 11a-12a).

The court acknowledged that the prosecutor decided to conduct the search because of the reports of gunfire from respondent's property, which indicated that respondent had violated the condition of his probation that he not possess firearms during his probationary period (Pet. App. 12a). However, the court noted that at the time of the search respondent had not yet been assigned a probation officer and had not received any counseling or supervision. The court also noted that the prosecutor did not inform either the probation department or the state court of the reports of gunfire, and that she did not tell the state court at the February 27 hearing about her earlier conversations with local law enforcement officers regarding her desire to search respondent's residence (*ibid.*). Relying on these facts, the court concluded that "the search was a subterfuge for conducting a criminal investigation" and was not a "genuine attempt to enforce probation" (*id.* at 12a-13a). Concluding that the officers' behavior "is the type of law enforcement conduct that ought to be deterred," the court held that *Leon* was inapplicable and that the

evidence seized from respondent's house should be suppressed (*id.* at 13a).

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The court of appeals held that the Due Process Clause requires personal notice to a defendant in a criminal case of a scheduled judicial proceeding, even though the defendant's attorney has been notified of the time and nature of the proceeding. That ruling is plainly in error. It departs from well-settled principles of representative litigation; it is inconsistent with the Federal Rules of Civil and Criminal Procedure and with this Court's decision in *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962); and it imposes on the prosecutor or the court the burden of duplicating steps that should properly be left to defense counsel. Notice to a defendant's attorney of the pendency of any proceeding that may occur during the course of a criminal prosecution is sufficient to satisfy any due process requirement that the defendant himself be notified of the proceeding.

II. The Fourth Amendment itself does not authorize the suppression of evidence. Rather, evidence obtained in violation of the Fourth Amendment may be suppressed only by operation of the judicially-created exclusionary rule. As this Court has noted, the question whether to apply the exclusionary rule in a particular situation turns on weighing the benefits of deterring illegal police conduct against the costs of withholding reliable evidence from the finder of fact. *United States* v. *Leon*, 468 U.S. 897, 907 (1984); *id.* at 908-913; see also *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1042-1050 (1984); *United States V. Calandra*, 414 U.S. 338, 349-352 (1974); *Stone* v. *Powell*, 428

U.S. 465, 486-495 (1976); *United States* v. *Janis*, 428 U.S. 433, 448-454 (1976).

After applying that balancing test, this Court concluded in *United States* v. *Leon* that the benefits from suppressing evidence obtained in reasonable reliance on a search warrant are "marginal or nonexistent" and cannot justify "the substantial costs of exclusion." 468 U.S. at 922. The Court therefore held that evidence obtained by law enforcement officers who relied on a facially valid search warrant may not be excluded at trial, even if the warrant is subsequently found to be defective, as long as the officers' reliance on the warrant was "objectively reasonable." *Ibid.* Accord, *Massachusetts* v. *Sheppard*, 468 U.S. 981, 987-988 (1984).

This case is closely analogous to *Leon*. The officers who searched respondent's home relied on a facially valid consent-to-search clause that a court had made a part of a judgment of probation. Although the federal court of appeals later held that the state court judgment of probation was invalid on procedural grounds (grounds we disagree with), the officers' reliance on the consent-to-search clause was as reasonable as the reliance of the officers in *Leon* on the facially valid warrant in that case. Moreover, the probation search in this case was conducted in a reasonable manner and in accordance with well-settled principles of state law. The circumstances leading up to the search show that the search was a bona fide probation search and not a pretext for a criminal investigation, as the court of appeals concluded. For that reason, the principles of *Leon* dictate that the evidence obtained in the search not be suppressed, even if the probation judgment was invalid because respondent was not personally notified of the February 27 hearing.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT REQUIRE PERSONAL NOTICE TO A DEFENDANT, RATHER THAN HIS ATTORNEY, OF A SCHEDULED COURT PROCEEDING

1. The Due Process Clause generally requires personal service of the pleading that commences a civil action, because that manner of service ensures that a person will be notified of the pendency of the suit and will have the opportunity to "choose for himself whether to appear or default, acquiesce or contest" a claim against him (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). See, *e.g.*, *Greene* v. *Lindsey*, 456 U.S. 444, 449 (1982). For much the same reason, the Sixth Amendment requires that a defendant in a criminal case "be informed of the nature and cause of the accusation." See, *e.g.*, *In re Oliver*, 333 U.S. 257, 273 (1948). The Federal Rules of Civil and Criminal Procedure implement these principles by requiring that the defendant be served with the pleading, such as the complaint, summons, or indictment, that commences a civil suit or a criminal prosecution. Fed. R. Civ. P. 4(d); Fed. R. Crim. P. 4 (d)(3), 9(c), 10; 18 U.S.C. 3432.[7]

Once a party has retained counsel, due process does not require that the party be personally served with subsequent pleadings or be given personal notice of subsequent proceedings. On the contrary, it is

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[7] Even with respect to the original charging document in a criminal case, the courts have not insisted on personal service on the defendant, as long as the defendant receives notice of the charges. See *United States* v. *Clark*, 407 F.2d 1336, 1337 (4th Cir. 1969); cf. *Segurola* v. *United States*, 275 U.S. 106, 109-110 (1927).

well settled that in our system of representative litigation pleadings may be served on counsel rather than on a party, even when a motion contemplates or calls for a hearing. In fact, the Federal Rules of Criminal and Civil Procedure expressly *require* that all subsequent pleadings be served on counsel rather than on a party. Fed. R. Crim. P. 49(b); Fed. R. Civ. P. 5(b).[8] It is likewise clear that notice to a party's counsel of the pendency of a proceeding is equivalent to notice to the party himself. As this Court has explained, once a party voluntarily chooses an attorney as his representative in a case, he "is considered to have 'notice of all facts, notice of which can be charged upon [his] attorney.'" *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1879)). The "facts" that may properly be charged to a party include the dates and nature of scheduled hearings. See 370 U.S. at 633-635.[9]

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[8] See 4 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1145, at 583 (1969) (footnote omitted) ("[t]he requirement of service on the attorney [in Fed. R. Civ. P. 5(b)] is to be followed literally; service upon a party represented by an attorney does not comply with the rule"); 3A C. Wright, *Federal Practice and Procedure: Criminal* § 822, at 235 (1982) (Fed. R. Crim. P. 49(b) should be construed in the same manner as Fed. R. Civ. P. 5(b)); see also *United States* v. *Lujan*, 589 F.2d 436, 438 (9th Cir. 1978), cert. denied, 442 U.S. 919 (1979).

Indeed, the legal profession generally frowns on direct communication between an attorney and an opposing party. See *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 31 n.52 (Stevens, J., dissenting); A BA Model Rules of Professional Conduct 4.2 (1983); ABA Model Code of Professional Responsibility DR 7-104(A)(1) (1980).

[9] The courts of appeals have reiterated and applied this principle in a variety of circumstances. See, *e.g.*, *Townsend* v.

The principle that a party is deemed to have notice of all facts known by his attorney rests on concerns of practicality and efficiency, as well as the determination that in an adversary system an attorney can and should be trusted with the responsibility of providing his client with the information necessary to a just defense or the prosecution of his cause. It is, in addition, fully consistent with due process principles. While notice of the pendency of a proceeding is essential to the opportunity to be heard in either a civil or a criminal case (*Mullane*, 339 U.S. at 314; *In re Oliver*, 333 U.S. at 273), due process demands only that notice be "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Mullane*, 339 U.S. at 314; see *Greene*, 456 U.S. at 449-451). Once a party has retained an attorney, it is entirely reasonable to conclude that his counsel will notify him of any upcoming proceedings, as well as assure that he is present if his attendance is necessary, because one of an attorney's responsibilities is to keep his client abreast of the progress of his case. *Link*, 370 U.S. at 633.[10] Notice to an attorney of a scheduled court

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Gray Line Bus Co., 767 F.2d 11, 19 (1st Cir. 1985) (counsel's failure to appear at a status conference and to object to the substitution of a new judge is charged to the client); *Loyd* v. *Loyd*, 731 F.2d 393, 400 (7th Cir. 1984) (notice to counsel of scheduled probate hearing is deemed to be notice to his client); *United States* v. *Everett*, 700 F.2d 900, 902 n.5 (3d Cir. 1983) (notice to defense counsel that the government has taken an appeal and has filed its brief is deemed to be notice to the defendant).

[10] See also ABA Model Code of Professional Responsibility EC 7-8 (1980); *id.* at EC 9-2 ("a lawyer should fully and promptly inform his client of material developments in the

proceeding can therefore properly be deemed to be notice to the party he represents.

There is no reason to adopt a different rule for criminal cases. Defense counsel in a criminal case, like his counterpart in the civil system, has the duty to inform his client of the progress of the case. See *Jones* v. *Barnes*, 463 U.S. 745, 751-754 & n.6 (1983); 1 ABA Standards For Criminal Justice: The Defense Function 4-3.8 (2d ed. 1980) ("[t]he lawyer has a duty to keep the client informed of the developments in the case and the progress of preparing the defense"). It is reasonable to rely on defense counsel in a criminal case to inform the defendant of scheduled proceedings, just as it is reasonable to rely on an attorney in a civil case to notify his client of such hearings. Accordingly, the rule set forth in *Link* v. *Wabash R.R.*, *supra*, should apply to criminal and civil cases alike.[11]

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matters being handled for the client"); ABA Model Rules of Professional Conduct 1.4(a) ("[a] lawyer shall keep a client reasonably informed about the status of a matter").

To be sure, respondent's state court counsel did not notify respondent of the February 27 hearing. But that failure does not alter the appropriate due process analysis. See, *e.g.*, *Walters* v. *National Ass'n of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 15 (citation omitted) ("the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions' ").

[11] Of course, if a defendant in a criminal case is seriously prejudiced by conduct of his attorney falling well below the standard for professionally competent assistance, he can seek relief on the grounds of ineffective assistance of counsel. See *Strickland* v. *Washington*, 466 U.S. 668 (1984).

2. Even if the question were not answered by this Court's decision in *Link* v. *Wabash R.R.*, *supra*, the rule adopted by the court of appeals has nothing to recommend it. Requiring the defendant to be personally notified of every hearing in a criminal case will not appreciably increase the likelihood that the defendant will be present at those proceedings at which his presence is essential but which he would otherwise not attend. First, defense counsel ordinarily can be relied upon to inform the defendant of the proceedings and the need for him to attend. Second, court rules typically require the defendant's presence at criminal trials and other critical proceedings in a criminal case, absent a waiver by the defendant. See, *e.g.*, Fed. R. Crim. P. 43. Only in the rare case in which the court rules do not require the defendant's presence, and in which defense counsel fails to apprise the defendant of a scheduled proceeding, would the requirement of personal notice to the defendant have any value.

At the same time, a requirement of personal notice would impose a needless burden on the criminal trial process. It would require either the prosecutor or the court to advise the defendant of each development in the litigation. Neither alternative would work satisfactorily. For the prosecutor to notify the defendant of upcoming hearings would offend the general principle that counsel should not contact an opposing party directly. In addition, that system would invite claims that the prosecutor has gone beyond the limits of notification and has interfered with the attorney-client relationship. For the court to bear the burden of notification would require already busy trial courts to engage in the burdensome formality of sending a defendant personal notice of every scheduled proceed-

ing. In either case, unless personal service rather than the mail were used, the notice requirement would invite litigation over whether and when the defendant in fact received notice of the proceeding. The notice requirement would therefore lead to needless makework in the overwhelming majority of cases, without substantially contributing to the purposes for which the Due Process Clause ordinarily requires notice.

Respondent argues (Br. in Opp. 17-18) that a personal notice requirement would not prove burdensome, since trial courts could always ask defense counsel whether he has informed his client of the proceeding and could postpone a hearing when defense counsel has failed to do so. That procedure, however, would be cumbersome. It would require cancellation of any hearing at which defense counsel said he had not notified the defendant, even if the defendant's presence was unnecessary Respondent's proposed procedure would also lead to unnecessary litigation, often brought as a collateral challenge to a conviction, over whether defense counsel had in fact told his client about the hearing, even when defense counsel said that he had done so. There is no apparent benefit from encouraging such litigation.

It is also unnecessary to have a personal notice requirement in order to protect a defendant's right to be present at critical points in a criminal case. That right can be protected on its own terms by court rule and constitutional principles. See *United States* v. *Gagnon*, No. 84-690 (Mar. 18, 1985), slip op. 4; *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). Thus, a defendant's right to be present will be ensured by due process principles in those cases, unlike this one, in which " 'a fair and just hearing would be thwarted by his absence.' " *United States* v. *Gagnon*, slip op.

4 (quoting *Snyder* v. *Massachusetts*, 297 U.S. 97, 107-108 (1934)).[12]

3. No decision of this Court supports the personal notice requirement imposed by the court of appeals in this case. The court of appeals relied (Pet. App. 9a) on *Faretta* v. *California*, 422 U.S. 806 (1975), but that decision is totally inapposite. *Faretta* held that a defendant has the right to represent himself at trial; in so ruling, the Court stated that, under the Sixth Amendment, "[i]t is the accused, not counsel, who must be 'informed of the nature and cause of the accusation'" (422 U.S. at 819). That principle, however, applies only to the notification of the charges against the defendant. It does not suggest that a defendant who is represented by counsel must be afforded personal service of all pleadings filed by a

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[12] The court of appeals left open the question whether the February 27 hearing was invalid because respondent was not present (Pet. App. 10a n.5), and there is no need for this Court to resolve it. We submit, however, that the hearing was not invalid for that reason. The February 27 hearing involved a purely legal question as to which respondent's participation could not have served any conceivable purpose. See *Price* v. *Johnston*, 334 U.S. 266, 285 (1948) (defendant's presence unnecessary at appellate proceedings); *United States* v. *Graves*, 669 F.2d 964, 972-973 (5th Cir. 1982) (defendant's presence unnecessary at conference on jury instructions). The absence of any need for respondent to be present was particularly clear in light of the fact that the legal issue presented at the hearing was undisputed; respondent's counsel agreed at the hearing that the prosecutor's position in her motion was "well taken" (Pet. App. 22a). The failure of respondent's counsel to object to going forward in his absence provides a further indication that respondent's presence was not essential to the fairness of the proceedings on February 27. See *United States* v. *Gagnon*, slip op. 5.

prosecutor during the course of a criminal proceeding or personal notice of all hearings in the case.

Respondent relies primarily on *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), and argues (Br. in Opp. 16-17) that he was entitled to be personally notified of the February 27 hearing, because the order entered by the trial judge at that proceeding affected his Fourth Amendment rights. *Gagnon*, however, does not support a personal notice requirement. That decision held that a probationer was entitled to notice of both a preliminary and a final probation revocation hearing (411 U.S. at 782), but it did not suggest that notice to the probationer's attorney of those proceedings would be insufficient to satisfy due process requirements. Indeed, the primary question in *Gagnon* was whether due process required that counsel be appointed for an indigent probationer at a probation revocation hearing. *Id.* at 783-791. Since one of the responsibilities of an attorney is to inform his client of upcoming proceedings, notice to a party's attorney of any such proceeding is properly deemed to be notice to the party, as this Court held in *Link* v. *Wabash R.R.*, *supra*. Thus, under this Court's precedents, the notice to respondent's counsel was sufficient to apprise respondent of the February 27 hearing. The order entered at the conclusion of that hearing was therefore not invalid because of any infirmity in the manner in which notice of the hearing was provided.

II. THE EXCLUSIONARY RULE DOES NOT REQUIRE THE SUPPRESSION OF EVIDENCE OBTAINED BY LAW ENFORCEMENT OFFICERS IN REASONABLE RELIANCE ON A CONSENT-TO-SEARCH CLAUSE IN A JUDGMENT OF PROBATION

The Fourth Amendment protects legitimate expectations of privacy and in property, but does not itself authorize the suppression of wrongfully seized evi-

dence. Evidence obtained in violation of the Fourth Amendment may be suppressed only by operation of the exclusionary rule, explicitly created by the courts as an instrument for protecting Fourth Amendment values. *United States* v. *Leon*, 468 U.S. 897, 906 (1984); *United States* v. *Calandra*, 414 U.S. 338, 349-352 (1974); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In *United States* v. *Leon* this Court concluded that the benefits from suppressing evidence obtained in reasonable reliance on a search warrant are "marginal or nonexistent" and cannot justify "the substantial costs of exclusion" (468 U.S. at 922). The Court therefore held that evidence obtained by law enforcement officers who relied on a facially valid search warrant may not be excluded at trial, even if the warrant is subsequently found to be defective, as long as the officers' reliance on the warrant was "objectively reasonable" (*ibid.*). See also *Massachusetts* v. *Sheppard*, 468 U.S. 981, 987-988 (1984).

This case fits well within the principles of *Leon*. It was entirely reasonable for the officers who searched respondent's home to rely on the facially valid consent-to-search clause that the trial court had imposed as part of respondent's sentence. Moreover, the officers executed the search in conformity with settled state law regarding probation searches, and they did so in a good faith effort to determine whether respondent had violated the terms of his probation by possessing a firearm. The principles of *Leon* and *Sheppard* compel the conclusion that the evidence seized from respondent's residence should not be suppressed, even if the February 27 hearing was procedurally defective.

A. The Officers' Reliance On The Consent-To-Search Clause In Respondent's Probation Order Was Objectively Reasonable

1. Under well-settled California law, a "consent-to-search" clause that is imposed as a condition of probation may authorize a probation officer or a policeman to search a probationer's residence. In 1971, the Califonria Supreme Court expressly upheld the imposition of a condition of probation identical to respondent's (*People* v. *Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), cert. denied, 405 U.S. 1016 (1972)), and the state courts have upheld similar consent-to-search clauses ever since. See *People* v. *Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 1265-1271, 224 Cal. Rptr. 112, 127-133 (1986).[13] The California courts have reasoned that requiring a probationer to consent to a search of his residence is valid under the Fourth Amendment, because a consent-to-search condition is a reasonable price for a defendant to pay in exchange for the greater liberty that comes with probation, rather than incarceration. *People* v. *Mason*, 5 Cal. 3d at 765-766, 488 P.2d at 633-634, 97 Cal. Rptr. at 305-306; see also *People* v. *Myers*, 6 Cal. 3d 811, 819, 494 P.2d 684, 689, 100 Cal. Rptr. 612, 617 (1972). Probation searches satisfy the Fourth

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[13] Search conditions like the one in this case are commonly entered in judgments of probation in California. See *People* v. *Bremmer*, 30 Cal. App. 3d 1058, 1062 n.1, 106 Cal. Rptr. 797, 800 n.1 (1973) ("[t]he wording of the condition [similar to the one imposed in this case] appears in printed forms used for recording judgments in Los Angeles and Orange counties"). Typically, the search condition is imposed on probationers who have engaged in crimes involving possession of contraband or stolen property. See *People* v. *Constancio*, 42 Cal. App. 3d 533, 540, 116 Cal. Rptr. 910, 913 (1974).

Amendment, the California courts have held, as long as they are reasonable: there must be reasonable grounds for the search, the search must be related to the legitimate objectives of probation, and the search must be executed in a reasonable manner. See, *e.g.*, *United States* v. *Johnson*, 722 F.2d 525, 527-528 (9th Cir. 1983) (construing California law); *People* v. *Guerrero*, 85 Cal. App. 3d 572, 581-582, 149 Cal. Rptr. 558, 560 (1978); *People* v. *Bremmer*, 30 Cal. App. 3d 1058, 1065-1607, 106 Cal. Rptr. 797, 802-803 (1973).[14]

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[14] Other courts have also upheld the imposition of search conditions on probationers or parolees on similar grounds. See, *e.g.*, *Owens* v. *Kelley*, 681 F.2d 1362, 1366-1368 (11th Cir. 1982); *State* v. *Perbix*, 331 N.W.2d 14, 21 (N.D. 1983); *Seim* v. *State*, 590 P.2d 1152, 1156 (Nev. 1979); *State* v. *Montgomery*, 115 Ariz. 583, 584-585, 566 P.2d 1329, 1330-1331 (1977). A number of courts have upheld warrantless searches of probationers or parolees when there is a reasonable suspicion that the probationer or parolee has violated a condition of his release. See, *e.g.*, *United States* v. *Scott*, 678 F.2d 32, 35 (5th Cir. 1982) (parolee); *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 263, 265-266 (9th Cir. 1975) (en banc) (probationer); *Latta* v. *Fitzharris*, 521 F.2d 246 (9th Cir.) (en banc), cert. denied, 423 U.S. 897 (1975); *United States ex rel. Santos* v. *New York State Bd. of Parole*, 441 F.2d 1216, 1217-1219 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972) (parolee); *State* v. *Fields*, 686 P.2d 1379, 1387-1390 (Hawaii 1984) (probationer); *State* v. *Velasquez*, 672 P.2d 1254, 1260-1261 (Utah 1983) (parolee); *People* v. *Huntley*, 43 N.Y.2d 175, 371 N.E.2d 794, 401 N.Y.S.2d 31 (1977) (parolee); *People* v. *Anderson*, 189 Colo. 34, 37-38, 536 P.2d 302, 305 (1975) (parolee).

A minority of courts have ruled that a probation or parole officer may not search the home of a probationer or parolee without a warrant supported by probable cause. *United States* v. *Rea*, 678 F.2d 382, 386 (2d Cir. 1982); *United States* v. *Workman*, 585 F.2d 1205, 1207 (4th Cir. 1978); *State* v.

The principles of *United States* v. *Leon* are fully applicable to a case such as this one, involving a search conducted pursuant to a court's judgment of probation. In *Leon*, the Court explained that the exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates" (468 U.S. at 916), and that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations" (*id.* at 921). It follows from *Leon* that no legitimate purpose served by the exclusionary rule is advanced by suppressing evidence obtained in good faith reliance on a facially valid court order authorizing a probation search.

The Court in *Leon* noted that the Fourth Amendment expressed a "strong preference for warrants" (468 U.S. at 914), and concluded that a "good faith" test, applied in the warrant context, would serve the purpose of encouraging law enforcement officers to resort to the warrant process. But the goal of encouraging police officers to use the warrant process was not the central basis for the decision in *Leon*. Rather, the Court based its decision principally on the proposition that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity" (*id.* at 919). "Where the officer's conduct is objectively reason-

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Fogarty, 187 Mont. 393, 413-416, 610 P.2d 140, 152-153 (1980) (consent-to-search clause overbroad); *State* v. *Cullison*, 173 N.W.2d 533 (Iowa), cert. denied, 398 U.S. 938 (1970); see also *Tamez* v. *State*, 534 S.W.2d 686, 692-693 (Tex. Crim. App. 1976) (holding consent-to-search clause overbroad, but noting that probationers have a lesser expectation of privacy than ordinary citizens). The federal courts of appeals in *Rea* and *Workman*, however, did not have before them a consent-to-search clause like the one at issue here.

able," the Court held, " 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.' " *Id.* at 919-920 (citation omitted). See also *Brown* v. *Illinois*, 422 U.S. 590, 611-612 (1975) (Powell, J., concurring); *United States* v. *Peltier*, 422 U.S. 531, 539, 542 (1975); *Michigan* v. *Tucker*, 417 U.S. 433, 417 (1974) ("[w]here the official action was pursued in complete good faith, * * * the deterrence rationale loses much of its force").

Even if *Leon* is viewed as based principally on the policies favoring resort to warrants, those policies are in large measure applicable to this case as well. Rather than conducting a search solely on their own initiative, the officers in this case relied on a search authorization granted by a court and limited to a particular individual. The officers were therefore not making the determination to invade respondent's privacy entirely on their own; instead, they were relying on the judgment of a court that a search of respondent's house was permissible if grounds should arise to indicate that respondent had violated the terms of his probation.

For that reason, the analysis in this case should not materially differ from the analysis employed in *Leon*. Just as a search or an arrest warrant can authorize a police officer to enter and search the residence of a probationer (see, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980)), the California consent-to-search clause authorizes any peace officer to enter and search a probationer's residence. In both cases, it is the responsibility of a judicial officer, who

is not a member of "the law enforcement team," to determine whether an intrusion on a person's privacy is justified. *Leon*, 468 U.S. at 917. In both cases, a law enforcement officer could not reasonably be expected to question the judicial officer's judgment that the order is legally sound. *Id.* at 920-921. In both cases, "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment" (*id.* at 916). And in both cases, once the order authorizing a search is entered, there is " 'literally nothing more the [probation officer or] policeman [could] do in seeking to comply with the law' " (*id.* at 921 (citation omitted)), except to execute the search in a reasonable fashion. In short, as a California court of appeals has explained, a challenge to a search conducted pursuant to the terms of a probation order "is analogous to that arising from a claim that a search warrant has been issued by a magistrate on less than probable cause or an arrest warrant on less than reasonable cause. Our present concern is with judicial power rather than police power." *People* v. *Bremmer*, 30 Cal. App. 3d 1058, 1062-1063, 106 Cal. Rptr. 797, 800 (1973). See *People* v. *Barbarick*, 168 Cal. App. 3d 731, 740, 214 Cal. Rptr. 322, 328 (1985) (admitting evidence seized in good faith reliance on a consent-to-search condition in a release-on-recognizance order that was later held invalid); cf. *Gluck* v. *United States*, 771 F.2d 750, 757-758 (3d Cir. 1985) (upholding a summons issued in good faith reliance on a Fed. R. Crim. P. 6(e) disclosure order later held to be defective).[15]

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[15] See also *People* v. *Washington*, 131 Cal. App. 3d 434, 438-440, 186 Cal. Rptr. 3, 5-6 (1982) (refusing to apply exclusionary rule when officers seized evidence in reasonable reli-

2. *Leon* and *Sheppard* require that a police officer's reliance on a search warrant must be objectively reasonable in order for the good faith exception to be applicable. 468 U.S. at 922; 468 U.S. at 988. That requirement is easily satisfied in this case. Here, as in *Sheppard*, the prosecutor and the officers who carried out the search "took every step that could reasonably be expected of them" to ensure that the search of respondent's residence was lawful. 468 U.S. at 989.

The prosecutor clearly did not act precipitously in deciding to undertake a search of respondent's residence. Once she learned that respondent may have violated the conditions of his probation by possessing a firearm, she did not immediately order a search of respondent's premises. Rather, she sought to ensure that the firearms and search conditions of his probation were in effect. She examined respondent's file, researched the applicable law, and discussed the matter with her superior (J.A. 165, 171). After doing so, she concluded that the probation conditions had not been stayed by the order of the municipal court staying the execution of respondent's period of confinement. Her judgment on that issue was entirely reasonable. The court's order was certainly susceptible to that construction, and the record in respondent's case included a notation that only his in-

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ance on probation order containing a consent-to-search clause even though, unbeknownst to the officers and probationer, the order had expired by operation of law); *People* v. *Tellez*, 128 Cal. App. 3d 876, 880-881, 180 Cal. Rptr. 579, 581-582 (1982) (refusing to suppress evidence seized in reasonable reliance on parole order containing consent-to-search clause even though it was later determined that the order had been unlawfully extended in reliance on a new state law).

carceration had been stayed (see J.A. 34).[16] That alone would be sufficient to demonstrate that the prosecutor acted reasonably. But there is more.

Against the possibility that her interpretation of the effect of the court's stay of confinement was incorrect, the prosecutor took the additional step of attempting to clarify respondent's status with the court. She filed a motion to clarify respondent's status (J.A. 44-47), she served the motion on respondent's counsel (*id.* at 48), and she told respondent's attorney why she wanted to ensure that the firearms and search conditions of respondent's probation were in effect (*id.* at 166). Respondent's counsel appeared at the hearing, and he did not object to going forward in respondent's absence (Pet. App. 22a). The state court judge noted that respondent was not present, but neither the judge nor defense counsel suggested that respondent's absence created a problem (*ibid.*). The officers who conducted the search were then advised that the municipal court had ruled that respondent was on probation (J.A. 66, 115, 123, 175).

Even if the February 27 hearing were invalid because respondent was not personally notified of the hearing in advance, neither the prosecutor nor the searching officers could reasonably be charged with

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[16] Under state law, a judgment of probation is not stayed absent an express statement by the trial court to that effect. See Cal. Penal Code §§ 1243 and 1467 (West 1982). The California Court of Appeals concluded in *In re Kennick*, 128 Cal. App. 3d 959, 962, 180 Cal. Rptr. 731, 732 (1982), that a trial court's stay of its judgment stayed the entire judgment unless the court specified otherwise. That decision, however, was handed down after the search in this case. Therefore, even if that decision was contrary to the prosecutor's conclusion, the prosecutor could not be charged with knowledge of that case.

anticipating that the probation judgment would be invalidated on that novel ground. Even if the municipal court was responsible for some procedural defect in the February 27 hearing, the prosecutor and police officers should no more be penalized for that error than the officers in *Massachusetts* v. *Sheppard*, *supra*, should have been penalized for the technical defect in the search warrant form in that case. Moreover, the state municipal court and the district court in this case (Pet. App. 17a) held that respondent was on probation at the time his residence was searched, which is powerful evidence that the officers' actions were objectively reasonable. *Leon*, 468 U.S. at 926 (applying good faith exception when the affidavit accompanying the search warrant application "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause"); cf. *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 5, 8-9.

Respondent suggests (Br. in Opp. 23-24) that the officers acted unreasonably, because they should have called off the search when respondent, through his lawyer, told the prosecutor that he was unaware of the February 27 hearing or the order entered at that proceeding. Even assuming that this would ever be an invalidating circumstance, a contention with which we disagree, respondent's suggestion is unavailing, for several reasons. First, it would require the officers to accept at face value respondent's assertion that he did not know about the February 27 hearing. Second, it would require the officers to conclude that, as a legal matter, respondent was not on probation until the February 27 order was entered. And third, it would require the officers to conclude that respondent's asserted lack of awareness of the February 27

hearing was sufficient to invalidate the order entered by the court on that day.[17]

To insist on such an extraordinary level of legal acumen and trust in respondent's uncorroborated protestations is asking too much of the searching team, as it assembled outside respondent's home. The far more reasonable course for the searching team at that point was to rely on the state court's facially valid probation judgment, just as it was reasonable for the officers in *Massachusetts* v. *Sheppard*, *supra*, to rely on the search warrant at issue in that case. Indeed, the state court judge spoke with the prosecutor during the search, after hearing from respondent's attorney. If it had been clear that the course of action followed by the searching party was unreasonable, the judge presumably could have said so. The judge, however, expressly stated that he would not approve or disapprove of the search (J.A. 74-75). Accordingly, neither respondent's protests nor those of his attorney made the officers' reliance on the state court's order unreasonable.

B. The Search Of Respondent's Home Was Not A "Subterfuge" For A Criminal Investigation

The court of appeals held that the good faith exception to the exclusionary rule was inapplicable because the search was "a subterfuge for conducting a criminal investigation" (Pet. App. 12a). In so ruling, the court of appeals relied (*ibid.*) on earlier Ninth Cir-

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[17] The suggestion that the searching party should have retreated when respondent and his attorney protested the search is even more unrealistic in light of the fact that before respondent telephoned his attorney, one of the officers saw what appeared to be an automatic weapon inside respondent's home (J.A. 116).

cuit decisions in which that court had stated that a probation search is valid only if there is a reasonable factual predicate for the search. *United States* v. *Johnson*, 722 F.2d at 527-528; cf. *United States* v. *Jarrad*, 754 F.2d 1451, 1452-1454 (1985), cert. denied, No. 84-6659 (Oct. 7, 1985) (parole search); *Latta* v. *Fitzharris*, 521 F.2d 246, 251-252 (en banc) (same), cert. denied, 423 U.S. 897 (1975). The court's conclusion, however, was both legally and factually erroneous.

As a legal matter, the court of appeals ignored the fact that the California law enforcement officers were acting not only in accordance with the terms of a facially valid probation order, but also consistently with well-settled California law regarding the execution of probation searches under consent-to-search conditions. The California courts have long held that consent-to-search clauses can validly serve as the basis for probation searches, and that a probation officer need not be a party to the search. *E.g.*, *People* v. *Mason*, *supra*; *People* v. *Palmquist*, 123 Cal. App. 3d 1, 7-8, 176 Cal. Rptr. 173, 177 (1981). Moreover, the reports of gunfire on respondent's property clearly satisfied the requirement under state law that there be a reasonable basis to believe that the probationer is violating the terms of his probation. See *People* v. *Britton*, 56 Cal. App. 3d 689, 697, 202 Cal. Rptr. 882, 887 (1984).

There is also no factual basis for the court's conclusion that the officers used the search as a subterfuge for a criminal investigation. The undisputed evidence showed that the sole purpose for the search was to determine whether respondent possessed a firearm in violation of the conditions of his probation (J.A. 82-83, 115, 116, 129, 145-146, 149, 152-153,

162-165). Neither the court of appeals nor respondent has identified the crime that was supposedly the true object of the search, and the record does not suggest what that offense was.[18] It was not a crime for respondent to own a firearm, because he had not been convicted of a felony. Pages 2-3, *supra;* see 18 U.S.C. App. 1202(a)(1) (making it a crime for a convicted felon to possess a firearm). It was also not a crime for a person to discharge a weapon in the rural area where respondent lived (J.A. 127). Only the conditions of respondent's probation made his possession of a firearm relevant. The officers had no reason to suspect that respondent had a narcotics laboratory in his basement; the officers inadvertently discovered that equipment lying in plain view while they were conducting their search for weapons (*id.* at 117-122, 190-191).

The facts on which the court of appeals relied do not even remotely support the court's conclusion that the search was a subterfuge. Although respondent had not been assigned a probation officer at the time of the search, that does not mean that the search was unrelated to the purposes of respondent's probation. Under California law, a trial court's failure to place a probationer under the supervision of the probation

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[18] Respondent hints (Br. in Opp. 22 n.22) that the prosecutor may have sought to uncover marijuana on respondent's property. That suggestion, however, is baseless. As explained above (page 4 note 2), before the search of respondent's residence the prosecutor had received a report from one of respondent's neighbors that marijuana was growing on the border between the neighbor's property and respondent's. That report was investigated and was determined to be unfounded prior to the search. There is no evidence that the prosecutor sought to search respondent's residence because she believed that respondent possessed narcotics.

office does not affect the validity of the judgment of probation.[19]

Likewise, the court of appeals' judgment that the search was not part of an effort to rehabilitate respondent (see Pet. App. 11a-12a) is as remarkable as it is inapposite. Even if true, it would not render the search invalid as a bad faith probation search. The decision to search respondent's residence was prompted by reports of gunfire from his property and therefore was directly related to the reason he was forbidden to possess firearms while he was on probation. Under California law, it is clear that the protection of the public is an important goal of the probation system. Cal. Penal Code § 1202.7 (West 1982); *People* v. *Mason*, 5 Cal. 3d at 764, 488 P.2d at 632, 97 Cal. Rptr. at 304; cf. *People* v. *Britton*, 156 Cal. App. 3d at 697, 202 Cal. Rptr. at 887 (parole). Determining whether respondent was in possession of firearms was directly related to this aspect of his probation. After all, respondent had

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[19] *In re Herron*, 217 Cal. 400, 404-405, 19 P.2d 4, 6 (1933); *In re Young*, 121 Cal. App. 711, 713, 10 P.2d 154, 155 (1932); *In re Giannini*, 18 Cal. App. 166, 169, 122 P. 831, 832 (1912); 16 Op. Att'y Gen. 72, 73, 75 (1950) (construing Cal. Penal Code § 1215 (West 1982)). The county probation officer is responsible for determining the level of supervision necessary for persons on probation. Cal. Penal Code § 1202.8 (West 1982). Compare *id.* § 1203(a) and (d) (Supp. 1986) (a "conditional sentence" is a form of unsupervised conditional release). In this case, the county probation department decided to await the outcome of respondent's pending appeal before undertaking his supervision. J.A. 89 (probation officer's "Supplemental Report and Petition") ("Following imposition of sentence the defendant exercised his right to appeal the judgment of the case. Probation supervision was not provided pending the appeal outcome.").

recently been convicted of brandishing firearms, which was apparently not the first time that he had wrongfully been involved with weapons (see J.A. 38-39, 42-43, 159-161), and the judge who had imposed respondent's probation insisted that he not possess firearms.[20] And even on the question of rehabilitation, the court of appeals was mistaken. Discouraging or preventing a probationer from causing the same public danger for which he had been convicted in the first place could scarcely be closer to the purpose of rehabilitation.

For much the same reason, it is immaterial that the prosecutor did not inform the sentencing judge at the February 27 hearing of the reports of gunfire on respondent's property or of her intent to search his residence for weapons. In light of the judge's insistence that respondent not possess weapons, this information surely would not have dissuaded the judge from granting the prosecutor's motion for clarification. In any event, the prosecutor expressly told respondent's counsel before that hearing began about those reports (J.A. 166), so it is clear that she was not attempting to keep any information from re-

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[20] Before imposing sentence the state trial court commented (J.A. 38-39): "[W]hat concerns the Court is this gun business. * * * What really scares me, Mr. Merchant, in my role in protecting the community[,] is that you are just that close in certain instances to violence being committed, and you are just not a man that should have or be near any guns at all. * * * [H]ere we are again, we are three years down the road with the same problem and had the officer acted any differently, you might have been the recipient of some bloodshed. That is the scarey [*sic*] thing about you and guns." The municipal court's comments also suggest that this was not respondent's first firearms offense. See also *id.* at 42-43, 159-161.

spondent. In sum, there is no legal or factual support for the contention that the March 3 search was a bad-faith "subterfuge" for a criminal investigation. For that reason, even if the consent-to-search clause in respondent's sentence was invalid, the evidence obtained in good faith reliance on that clause should not have been suppressed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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